WATER USERS ASSOCIATION NO. 1

IBLA 87-229 Decided April 11, 1989

Appeal from a decision of the Manager, White River Resource Area, Bureau of Land Management, dismissing protest of right-of-way holder to liability for testing and/or mitigation of cultural resources site uncovered as a result of operations under the right-of-way. C-30749.

Affirmed in part and reversed in part.

1. National Historic Preservation Act: Generally--National Historic Preservation Act: Applicability--Rights-of-Way: Conditions and Limitations

   Where issuance of a right-of-way for a dam and reservoir in an area likely to contain archaeological artifacts is conditioned upon a stipulation requiring the holder to assume the responsibility for testing and/or mitigation of impacts to sites discovered as a result of operations pursuant to the right-of-way, a decision requiring compliance with that stipulation will be affirmed on appeal.

2. National Historic Preservation Act: Generally--National Historic Preservation Act: Applicability--Rights-of-Way: Conditions and Limitations

   A stipulation imposing liability on a right-of-way holder for mitigation of impacts to cultural resources discovered as a result of operations under the right-of-way will be enforced according to its terms. Where 90 percent of the land embraced in a cultural resources site discovered as a result of operations under a right-of-way is situated on public land and/or private land outside the boundary of the right-of-way, the liability of the holder for mitigation expenses will be upheld for portions of the site within the right-of-way in the absence of language imposing liability for sites outside the right-of-way grant.

APPEARANCES: Donald H. Hamburg, Esq., Glenwood Springs, Colorado, for appellant; Lowell L. Madsen, Esq., Office of the Regional Solicitor, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Water Users Association No. 1 (Water Users), a subdivision of the Colorado River Water Conservation District (Conservation District), appeals from a decision of the Manager, White River Resource Area, Bureau of Land Management (BLM), dismissing appellant's protest of its liability for testing and/or mitigating cultural resources site 5RB2477. The decision was based on the terms and conditions of the right-of-way grant, C-30749, issued to appellant for use of Federal public domain in construction of the Taylor Draw Dam and Reservoir.

The record reflects that Water Users was established as a subdistrict within the Conservation District by decree of the District Court of the County of Rio Blanco, State of Colorado, pursuant to the provisions of Colorado statute. C.R.S. 37-46-110 through 37-46-114 (1973). Its purpose is the development and operation of the Rangely Project consisting of a dam and reservoir on the White River east of Rangely, Colorado. On September 8, 1980, an application for right-of-way was filed with BLM by the Conservation District on behalf of Water Users for construction of the Rangely (Taylor Draw) Reservoir "to store and deliver water for future industrial, domestic, irrigation and recreational needs in Western Rio Blanco County."

Right-of-way C-30749 authorizing the use of certain Federal public domain for purposes of the construction, operation, and maintenance of the Taylor Draw Dam and Reservoir was issued to the Conservation District on August 28, 1982. Included in the public lands embraced in this right-of-way grant were the tracts in parcel D, the dam site and environs, encompassing part of lots 12 and 13 in sec. 27 and part of lots 1 and 2 in sec. 34, T. 2 N., R. 101 W., sixth principal meridian.

The right-of-way contains certain provisions relevant to this appeal. Paragraph 5.A. of the right-of-way provides in pertinent part:

> The Holder shall abate any condition caused by the construction, operation, maintenance, or termination of the project that causes or threatens to cause serious and irreparable harm or damage to any person, structure, property, land, fish and wildlife and their habitats, or other resource. Any structure, property, land, fish and wildlife habitats, or other resource harmed or damaged by the Holder as a result of the construction, operation, maintenance or termination of the system shall be reconstructed, repaired, and rehabilitated by the Holder to the satisfaction of the Authorized Officer.

(Right-of-Way at 5). The obligation of the holder with respect to cultural resources is more specifically set forth at stipulation 1:

> If, in its operations, the operator discovers any cultural remains, monuments or sites, or any object of antiquity subject to the Antiquities Act of June 8, 1906 (34 Stat. 225; 16 U.S.C. secs. 431-433), the Archaeological Resources Protection Act of

> 1979 (PL 96-95), and 43 CFR, Part 3, the operator shall immediately cease activity and report directly to the Area Manager. The Bureau will then take such actions as shall follow the mitigation requirements set forth by BLM concerning protection, preservation, or disposition of any sites or material discovered. In cases where salvage excavation is necessary, the cost of such excavation shall be borne by the operator unless otherwise agreed upon.

(Right-of-Way at 8 (Appendix B)).

Subsequently, on May 8, 1986, an amended right-of-way was issued to appellant for the lands in secs. 27 and 34 for the purpose of authorizing the construction and operation of a hydroelectric generating plant at the site. Stipulation 1 attached thereto provides:

> The Holder shall immediately bring to the attention of the Authorized Officer any and all antiquities or other objects of historic or scientific interest including but not limited to, historic or prehistoric ruins or artifacts discovered as a result of operations under this right-of-way grant. The Holder shall immediately suspend all activities in the area of the object and shall leave such discoveries intact until instructed to proceed by the Authorized Officer. Approval to proceed will be based upon evaluation of the cultural significance of the object. Evaluation shall be by a qualified professional selected by the Authorized Officer from a Federal agency insofar as practicable. When not practicable, the Holder shall bear the cost of the services of a non-Federal professional. The Holder shall follow the mitigation requirements set forth by the Authorized Officer concerning protection, preservation or disposition of any sites or material discovered. In those situations where the Authorized Officer determines that data recovery and/or salvage excavations are necessary, the Holder shall bear the cost of such data recovery and/or salvage operations.

(Exh. B to Amended Right-of-Way).

Stipulation 15 (Appendix C) of the right-of-way as issued in 1982 required the presence of a professional archaeologist as a monitor at the time surface-disturbing activities were undertaken within parcel D. The stipulation further required the submission of a report by the monitor for approval by BLM. As a result of the monitoring of dam-construction activities, a site identified as 5RB2477 was recorded in a report entitled "Class III Inventory of Cultural Resources of the Taylor Draw Res." by C. Rolen dated April 20, 1983. The report described the site as an "open lithic scatter" and identified cultural material consisting of "less than 12 unretouched interior flakes, made from 2 kinds of chert and 2 kinds of quartzite." The report further disclosed that:

> Limits of sparse lithic scatter recorded are within BLM property boundaries and within the flagged BLM/Taylor Reservoir Project

> area. This entire flagged area was closely inspected to determine if a main site area, i.e., open campsite or definable activity area could be identified as such. It could not. The scatter of less than 12 unretouched lithics possibly constitutes material redeposited through slopewash from the low knoll area approximately 1/4 mile west - beyond this Project's survey boundary on BLM land.

This report was forwarded to BLM with a cover letter from Grand River Consultants in June 1983.

Thereafter, by letter to Grand River Consultants dated June 29, 1983, BLM disputed the assessment. The letter stated that an inspection by BLM employees had disclosed the presence of an open campsite "impacted by project construction." The BLM letter requested a meeting to discuss measures "to protect the site." In a supplemental report dated July 7, 1983, a BLM official stated:

> Because of the very light scatter of lithic debris on the surface of the site, major questions concerning the site significance remain unanswered. We need to know to what extent buried cultural materials are preserved on the site, and how these might be recognizable as discrete activity loci. At a minimum this requires testing of the site with scattered test pits.

(Cultural Resources Evaluation Record at 2).

Thereafter, nothing apparently transpired until the January 14, 1986, letter from BLM to the Colorado State Historic Preservation Officer requesting a determination of the eligibility of site 5RB2477. The response of that office, communicated by letter dated January 29, 1986, was that the "site is potentially eligible to [sic] the National Register of Historic Places." It was recommended that the site be tested for buried cultural materials.

This was followed up by a letter of March 14, 1986, from BLM to appellant noting that construction of the dam and recreational use of the reservoir is threatening the site and requiring the hiring of an archaeologist to develop a mitigation plan for recovery of data from the site. Subsequently, Water Users protested that it was not liable for testing and mitigation of this site. In response to the protest, BLM issued the decision from which this appeal is brought. The protest was dismissed by BLM on the ground that field examinations by BLM staff in June 1983 and the subsequent July 1983 report reflect the existence of a site with possible cultural significance within the right-of-way and further that the stipulations to the right-of-way, including the amended right-of-way, obligate the holder to bear the expense of testing and mitigating the site. The BLM decision concluded that appellant is "required to perform necessary testing and/or mitigation of site 5 RB 2477, as required by the right-of-way grant of August 28, 1982, as amended May 8, 1986."

In the statement of reasons for appeal Water Users asserts that the potential site was actually discovered by BLM in 1978 prior to approval of the right-of-way in 1982 and that appellant is not responsible for costs of evaluating the resource or any required mitigation measures because it was not "discovered" during construction. Appellant has also requested a hearing in the event of a dispute as to the fact of prior discovery. The answer filed by BLM asserts that even if it is assumed that the "site" was known to exist prior to issuance of the right-of-way in 1982, the existence of the cultural materials identified in the April 1983 and July 1983 cultural resources report was discovered later. Further, BLM contends that appellant agreed by stipulation to the right-of-way grant to bear the costs of data recovery and/or salvage operations if cultural remains were found. Counsel for BLM argues that the Secretary is authorized by statute to charge reasonable costs for evaluation and data recovery with respect to historic properties to Federal licensees/permittees as a condition to issuance of the license or permit, citing 16 U.S.C. § 469c-2 (1982). Additionally, BLM points out this authority is not limited to properties known to exist prior to issuance of the license or permit, but rather is intended to protect values which have not yet been discovered as well as those already known, citing Cecil A. Walker, 26 IBLA 71, 75 (1976).

In a reply brief filed with the Board, appellant asserts that in September 1981 class I and class II cultural resource inventories (Reply Exh. No. 3) were prepared for the Taylor Draw Reservoir and that neither one of these inventories referred to site 5RB2477. Water Users also points to archaeological investigations related to the relocation of the Northwest Pipeline in the vicinity of the reservoir and the class III inventory of cultural resources dated July 30, 1982, prepared for the reservoir project by Grand River Consultants (Reply Exh. No. 4). Appellant contends these reports never mentioned site 5RB2477, even though the class III inventory focused in part on parcel D and identified two other sites therein, 5RB2346 and 5RB2347. Appellant points out that the area originally included in the application for parcel D was reduced at the request of BLM officials to include only the area required for the dam site and construction activities. Further, appellant asserts that only a small portion of the site is located within the right-of-way (parcel D) with about 90 percent of the site located outside the right-of-way and about 30 percent of the site situated on private land.

Water Users argues that the relevant provisions of the statute at 16 U.S.C. §§ 469(a) and 470(f) (1982) require consideration of the potential adverse effects of the right-of-way prior to approval of the right-of-way authorizing use of the land and that BLM has no authority to require appellant to pay for evaluation and mitigation of a site known to BLM prior to approval of the right-of-way but not disclosed to appellant until after issuance of the right-of-way and commencement of construction.

Two fundamental issues are raised by this appeal. The first is whether the known existence of an archaeological relic prior to issuance of a right-of-way absolves the holder of responsibility for evaluation and mitigation of the impact to cultural resources subsequently discovered as a result of

construction and/or operation of the facilities authorized by the right-of-way. A second question presented is whether the holder of a right-of-way may be held responsible for mitigation of the impact to cultural resources situated outside the boundary of the right-of-way whether on private land or on other public domain.

[1] Pursuant to section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f (1982), and the regulations promulgated pursuant thereto, the Department is required when acting on a right-of-way application to seek to identify any property eligible for inclusion in the National Register that is located within the area of the project's potential impact and which may be affected by the project. See 36 CFR 800.4. 1/ The Department is also obligated pursuant to statute to provide for the preservation of archaeological data (including relics and specimens) which might otherwise be lost as a result of construction associated with a dam project. 16 U.S.C. §§ 469 to 469c-2 (1982). 2/ This Board has upheld stipulations attached to public land-use authorizations which require archaeological inspections prior to surface-disturbing activities where archaeological finds have not yet been made noting a "Congressional intent to protect values which have yet to be discovered as well as values which are already known." Cecil A. Walker, supra at 75-76 (1976); accord, General Crude Oil Co., 28 IBLA 214, 83 I.D. 666 (1976). The Walker case involved stipulations required as a condition to an oil and gas lease in an area where the record disclosed a likelihood of significant archaeological values. In this context the Board upheld a stipulation requiring the lessee to retain an archaeologist to examine leased lands prior to engaging in surface-disturbing operations thereon and to salvage any archaeological properties found. 3/ The Board further affirmed the imposition of liability for this expense on the lessee whose use of the land occasioned the need for protection of the archaeological resources. Cecil A. Walker, supra at 78.

We find the precedent of the Walker case to be germane to the present appeal. Although cultural resource inventories (class I, II, and III) conducted prior to issuance of the right-of-way failed to disclose the site at issue here, there were indications that further artifacts and/or sites might be found within the right-of-way. The class I inventory noted that:

> According to prior research in western Colorado we may expect sites of any or all of the following periods: Paleo-Indian; Early, Middle, and Late Archaic; Fremont; Post-Archaic; Late Post Archaic; Ute; and Historic (Buckles 1971; Frison 1974, 1978; Jennings 1980). Given this information we expect that sites of

1/ As appellant has pointed out, both this statute and the regulations call for the assessment to be made prior to approval of the project.
2/ Since the 1974 amendment of this statute, this obligation applies to other Federal construction projects and Federally licensed projects, as well as dams. 16 U.S.C. § 469 (1982).
3/ This requirement has also been upheld when applied as a condition to a reservoir right-of-way. Ute Water Conservancy District, 47 IBLA 71 (1980).

> National Register significance may be located and that extensive mitigation may be required.

J. Hester, J. Hartley, and T. Babcock, Cultural Resource Class I Inventory, Taylor Draw Reservoir 1 (Sept. 2, 1981 (draft)). Several prehistoric sites were discovered in the Taylor Draw Reservoir project area as a result of prior studies, including more than one lithic scatter considered to be an open campsite. Id. at 5-6. The study prepared by appellant's consultant concluded "we may expect to find Fremont villages on the terrace edges immediately adjacent to the river." Id. at 15.

Thus, it is clear from the record there was substantial basis for BLM's inclusion of the cultural resources protection stipulations in Water Users' right-of-way. A decision enforcing a stipulation requiring a lessee of the public lands to mitigate damage to an archaeological site will be affirmed by the Board where the remedy is clearly required by the terms of the stipulation. Beartooth Oil & Gas Co., 85 IBLA 11, 92 I.D. 74 (1985). Appellant's obligation with respect to cultural resources is defined in part at stipulation 1 (Appendix B) of the right-of-way which provides that upon the discovery of cultural remains in the course of its operations the operator shall cease operations and report to BLM. This stipulation further provides that where salvage is required to mitigate damage to the site, the cost shall be borne by the operator.

Stipulation 1 (Exh. B) of the amended right-of-way (quoted supra) plainly requires the holder to bring any prehistoric ruins or artifacts "discovered as a result of operations under this right-of-way grant" to the attention of BLM officials. Further, the stipulation provides that: "Approval to proceed will be based upon evaluation of the cultural significance of the object." The stipulation also expressly provides that the cost of data recovery and/or salvage excavations shall be borne by the holder.

As a threshold matter, we are not persuaded by appellant's contention that these stipulations do not apply to site 5RB2477 because it was known to exist prior to issuance of the right-of-way. Although it appears from the record that a relic was recovered from the site by a BLM employee in 1978, it is also clear from the record that further discoveries were made as a consequence of appellant's operations on the right-of-way in 1983. The potential significance of this site only became apparent as a consequence of these discoveries. Assuming that a relic was recovered from the site by a BLM employee in 1978, the record is clear that the site was not discovered until further artifacts were disclosed as a result of appellant's operations on the right-of-way in 1983. No material issue of fact in this regard has been raised on the record in this case. Accordingly, appellant's request for an evidentiary hearing is denied. Hence, we find the stipulations regarding testing and mitigation of the site disclosed as a result of operations within the right-of-way to be applicable.

Accordingly, the question is whether the BLM decision is supported by the terms of the stipulations to the right-of-way. Reading the relevant

stipulations quoted above regarding impact on cultural resources, it appears that once cultural resources are discovered as a result of operations, two procedures are involved. The first is the testing or evaluation of the site to determine the significance of the site and whether procedures to mitigate impacts are required. The second procedure is the mitigation of impacts on the cultural resources. It appears that the initial evaluation of this site by Grand River Consultants was rejected by BLM officials after examination by their archaeological staff disclosed the presence of a campsite impacted by construction. As a result, further testing was deemed necessary. The July 7, 1983, cultural resources evaluation record quoted supra concludes that "major questions concerning the site significance remain unanswered" and recommends "testing of the site with scattered test pits." The State Historic Preservation Officer responded to BLM's inquiry regarding the site by finding it is "potentially eligible" for inclusion in the National Register and recommending that the site be tested. Accordingly, we must conclude that the stipulations to the right-of-way provide a legal basis for the BLM imposed requirement to perform necessary testing and/or mitigation of site 5RB2477. 4/

The second major issue which we must resolve in the context of this appeal is the applicability of the stipulations cited above to portions of the site outside the boundary of the right-of-way. It appears from the exhibits submitted by Water Users on appeal that a relatively small portion of the site is situated within the bounds of the right-of-way 5/ and that the balance of the site is situated on private land or public domain outside the right-of-way. The stipulations described above are silent on whether the obligation to test and/or mitigate sites discovered during operations under the right-of-way extends to areas outside the right-of-way. Counsel for BLM argues that this fact is not material since the stipulation does not limit appellant's mitigation obligations to lands within the right-of-way.

[2] This issue is apparently a matter of first impression before the Board as we are not aware of any other cases directly on point. The Department has held that the obligation under the National Historic Preservation Act to identify properties eligible for inclusion in the National Register within the area of a project's impact which may be affected by the project extends to a survey of cultural resources on private lands impacted by the project. The Extent to Which the National Historic Preservation Act Requires Cultural Resources to be Identified and Considered in the Grant of a Federal Right-of-Way, 87 I.D. 27 (1979). 6/ In that case the right-of-way was for a pipeline project which crossed a substantial amount of private

4/ In the absence of an evaluation of the significance of the site based on testing procedures, the determination of what, if any, mitigation is required would be premature.
5/ Appellant asserts that only 10 percent of the site is within the limits of the right-of-way, while 30 percent is situated on private property and the remainder is on public domain lands outside the right-of-way.
6/ Overruling in part, Western Slope Gas Co., 40 IBLA 280, reconsideration denied, 43 IBLA 259 (1979).

acreage 7/ as well as public lands. The Secretary held that the area of the project's potential environmental impact included the geographic area where direct and indirect effects generated by the project could reasonably be expected to occur, quoting the regulation at 36 CFR 800.2(o). 87 I.D. at 29. Applying this principle, the Secretary held that non-Federal lands are to be inventoried when construction activities on Federal land affect surrounding non-Federal land. 87 I.D. at 30. 8/ Further, the Secretary held that the cultural resource identification requirement extends to those private tracts of land crossed by connected portions of the pipeline authorized by the Federal right-of-way. 87 I.D. at 32.

Stipulations requiring the protection of resources on private lands which will be affected by the Federally authorized use have been upheld on appeal where they were predicated on a specific statutory and regulatory mandate. In Grindstone Butte Project, 24 IBLA 49 (1976), 9/ the Board upheld a stipulation to a right-of-way requiring reseeding of disturbed areas along irrigation canal banks on both private and public lands crossed by the canal. Among the statutes cited as authority for the challenged stipulations were the National Environmental Policy Act of 1969 (NEPA), section 102, 42 U.S.C. § 4332 (1982), and the Historic Sites Act of August 21, 1935, 16 U.S.C. §§ 461-467 (1982). 24 IBLA at 51 n.2. The requirement to comply with statutes such as NEPA and the National Historic Preservation Act in authorizing various uses of the public lands and natural resources has similarly led to the imposition of archaeological protection stipulations in the context of issuing oil and gas leases for Federal mineral interests in lands patented to private parties with a reservation of oil and gas. General Crude Oil Co., supra. 10/

Clearly there is legal authority to support the imposition of stipulations requiring the holder to mitigate the impact of a project upon cultural resources situated on lands outside the boundaries of the right-of-way grant when issuing a right-of-way. 11/ Further, as noted above, this is not necessarily limited to values known to exist at the time the right-of-way is

7/ More than 60 percent of the acreage in the right-of-way was on private land.
8/ In this respect, the opinion was in accord with the decision in Western Slope Gas Co., 40 IBLA at 287.
9/ Aff'd, Grindstone Butte Project v. Kleppe, 638 F.2d 100 (9th Cir.), cert. denied, 454 U.S. 965 (1981).

10/ Although the Board in this en banc decision affirmed imposition of the stipulation, the dissenting opinion noted some inherent potential problems with the enforceability of the stipulation as it applies to private lands. General Crude Oil Co., supra at 235-37, 83 I.D. at 675-76 (Stuebing, A.J., dissenting). This limitation on enforceability (requiring private landowner's consent) was conceded by counsel for BLM in the present appeal.
11/ We recognize that the Board has declined to uphold stipulations related to impacts of coal lease development on private lands where the interest protected was not tied to some specific statutory mandate such as the obligation to protect archaeological properties. Blackhawk Coal Co., 68 IBLA 96 (1982). Cases such as this are distinguishable based on the absence of

issued. Stipulations requiring mitigation activities to be conducted on non-Federal lands have been upheld both where the land is within a Federal oil and gas lease for split-estate lands the surface of which is privately owned, General Crude Oil Co., supra, and where the land is outside the Federal right-of-way on private lands included in the project. Grindstone Butte Project, supra. However, when presented with the issue of a grantee's liability for the expense of mitigation of impacts to cultural resources pursuant to a stipulation attached to a drilling permit for an oil and gas well, this Board has required a stipulation which makes this liability explicit. Beartooth Oil and Gas Co., supra. In Beartooth the site at issue was situated outside the area of the drilling permit to which the stipulation imposing liability on the appellant was attached, but within the boundaries of the oil and gas lease for which the drilling permit was issued. The site had been identified as a cultural resources site prior to approval of the drilling permit. The Board found the language of the stipulation unambiguous in requiring the permittee to bear the expense of mitigation of the site which had been vandalized during the life of the drilling permit even though the damage had apparently been caused by third parties. We believe the same standard of specificity should be applied in reviewing an assessment of liability for mitigating sites situated in whole or in part outside the boundaries of the right-of-way.

The issue is whether the stipulations relied upon by BLM to impose liability on appellant for mitigation of sites or portions thereof located outside the right-of-way on other public or private lands support such an obligation. Reviewing the provisions of the pertinent stipulations quoted previously, we find that the most specific in setting forth the obligation of the holder is stipulation 1, Exh. B, attached to the amended right-of-way. This requires the holder to notify BLM immediately upon discovery of any objects of historic interest discovered as a result of operations under the right-of-way. Further, the holder is required to follow the mitigation requirements concerning "any sites or material discovered." Operations on public lands are necessarily limited to the boundaries of the right-of-way. See 43 CFR 2801.3, 2803.2. Hence, we find that under the terms of the stipulation as drafted the artifacts and sites discovered for which liability for mitigation is assumed is properly limited to sites or portions thereof within the right-of-way in the absence of language extending this liability to areas outside the right-of-way boundary. This reading of the stipulation is particularly compelling in the circumstances of the case at issue where there is evidence that as much as 90 percent of the site is outside the boundaries of the right-of-way. In this case the record discloses that the tracts of public land outside the right-of-way included in the site (the western portions of lot 12, sec. 27, and lot 2, sec. 34) were excluded from the right-of-way application at the request of BLM officials. In response to a written request from BLM after a meeting between appellant and BLM officials on July 13, 1982, appellant submitted a revised description for parcel D on July 28, 1982, omitting the western 580 feet of each of these lots from the right-of-way.

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fn. 11 (continued)
specific statutory and regulatory authority to support the responsibility imposed by the stipulation.

Applying these principles to the case at issue here, we must conclude that the cultural resources protection stipulation supports the BLM decision to require testing and/or mitigation of site 5RB2477 at the holder's expense to the extent the site is situated within the confines of the right-of-way. The record indicates the site was discovered as a result of artifacts which were revealed during operations conducted pursuant to the right-of-way authorization and that site is threatened by operations under the right-of-way as well as visitors occasioned by the facility constructed pursuant to the right-of-way.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part and reversed in part.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Anita Vogt
Administrative Judge
Alternate Member